

This Opinion is Not a
Precedent of the TTAB

Mailed: September 23, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re 1872 LLC

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Serial No. 88897035

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Thomas L. Difloure of the Law Office of Thomas L. Difloure,
for 1872 LLC.

Douglas M. Lee, Trademark Examining Attorney, Law Office 129,
Pam Willis, Managing Attorney.

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Before Mermelstein, Shaw and Larkin,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

1872 LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark AXION for goods identified as “Belts for clothing; Footwear; Headwear; Hoodies; Shirts; Shoes; Shorts; Socks; Sweatshirts; T-shirts; Jogging pants,” in International Class 25.¹

¹ Application Serial No. 88897035 was filed on May 1, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a) based on a date of first use of the mark anywhere of October 1, 2017, and a date of first use of the mark in commerce of October 7, 2017.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the previously-registered mark AXEON LABS, also in standard characters, for "Clothing, namely, hats, beanies, shoes, shirts, pants, coats, hoodies, pull-overs, gloves; Athletic apparel, namely, hoodies, pants, shirts, shorts, sports bras, gloves, shoes," in International Class 25.²

When the refusal was made final, Applicant appealed. Both Applicant and the Examining Attorney filed briefs. We reverse the refusal to register.

I. Evidentiary Matters

The Examining Attorney objects to internet web pages attached to or referenced in Applicant's appeal brief on the ground that the evidence was not properly introduced prior to the appeal. The Examining Attorney's objection to the evidence is sustained. The record in an application should be complete prior to the filing of an appeal. Trademark Rule 2.142(d), 37 CFR § 2.142(d). An exhibit attached to a brief which was not made of record during examination is untimely, and generally will not be considered. *Id.*; *In re Compania de Licores Internacionales S.A.*, 102 USPQ2d 1841, 1843 (TTAB 2012). Further, providing a web page address is not sufficient to introduce the underlying webpages into the record. *See In re ADCO Indus. – Techs., L.P.*, 2020 USPQ2d 53786, at *2 (TTAB 2020). Accordingly, we do not consider the new material attached to or referenced for the first time with Applicant's brief.

² Registration No. 4609479, issued September 23, 2014. LABS is disclaimed.

II. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (“*DuPont*”). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. See, e.g., *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). There is no mechanical test for determining likelihood of confusion and “each case must be decided on its own facts.” *DuPont*, 177 USPQ at 567.

In any likelihood of confusion analysis, two key considerations are the similarities between the goods and the similarities between the marks. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. The nature and similarity or dissimilarity of the goods, the established, likely-to-continue trade channels, and the classes of purchasers.

We begin with the similarity of the respective goods. Applicant’s and Registrant’s goods are, in part, legally identical inasmuch as both include footwear, headwear, hoodies, shirts, and shorts. The fact that some of Registrant’s clothing articles are specifically described as “athletic apparel” does not change the identical nature of the

goods because Applicant's clothing articles include no such limitation and must be read to include all clothing articles, including Applicant's more narrowly described "athletic apparel." See *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) ("Applicant's broadly worded identification of goods necessarily encompasses Registrant's narrowly identified goods). Applicant's remaining goods, belts for clothing, socks, sweatshirts, and jogging pants are closely related to Registrant's goods as well. Applicant does not argue otherwise.

We need not find similarity as to each and every good listed in Applicant's identification. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of goods in a particular class in the application. See *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods in the application).

Because the goods are identical in part and without restriction, we must presume that they are sold in all normal trade channels and to all normal classes of purchasers for such goods. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1906 (Fed. Cir. 2012). Thus, we consider Applicant's and Registrant's trade channels and classes of purchasers to be the same. *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ

721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

The *DuPont* factors regarding the similarity of the goods, channels of trade, and classes of purchasers strongly favor a finding of a likelihood of confusion.

B. The similarity or dissimilarity of the marks in their entireties in terms of appearance, sound, connotation and commercial impression.

We next consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The proper test regarding similarity “is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks and citation omitted)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019), (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

Moreover, the in-part identical nature of Applicant’s and Registrant’s goods reduces the degree of similarity between the marks that is necessary for confusion to be likely. *See, e.g., Viterra*, 101 USPQ2d at 1912; *Mighty Leaf*, 94 USPQ2d at 1260.

Applicant's mark is AXION. The registered mark is AXEON LABS. The Examining Attorney argues that "Applicant's mark 'AXION' and the first part of the registered mark ["AXEON"] are essentially phonetic equivalents and thus sound similar."³ Although there is no "correct" pronunciation of a mark, *Viterra*, 101 USPQ2d at 1912, we agree that consumers are likely to verbalize AXION and AXEON in a similar manner. Again, Applicant does not argue otherwise. "Slight differences in the sound of similar marks do not avoid a likelihood of confusion." *In re Energy Telecomms. & Elec. Ass'n*, 222 USPQ 350, 351 (TTAB 1983). Similarity in sound alone may be sufficient to support a finding that the marks are confusingly similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

The presence of the term LABS in Registrant's mark is less significant because it comes after AXEON, and because it is likely to be perceived as an entity designation. *See Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered."); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (affirming Board's finding that the dominant portion of the mark THE DELTA CAFE was DELTA, not the disclaimed generic term CAFE).

In terms of appearance, both marks are in standard characters and the cited mark could be displayed in any font, style, or typeface, including one that minimizes the significance of the term LABS. *See Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*,

³ Examining Attorney's Br., 6 TTABVUE 6.

115 USPQ2d 1816, 1823 (TTAB 2015) (a standard character mark “could be used in any typeface, color, or size, including . . . one that minimizes the differences or emphasizes the similarities between the marks.”) (citing *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011)). Further, given that both AXION and AXEON appear to be coined terms, their similar pronunciation is likely to cause consumers to consider both marks to have similar connotations and commercial impressions, however arbitrary.

In sum, we find that the marks are similar in sound, and likely to be perceived as similar in appearance, connotation, and commercial impression. This *DuPont* factor also favors a finding of likelihood of confusion.

C. Other Established Fact Probative of the Effect of Use.

Typically, similarity between the marks and similarity of the goods would suffice to support a finding of a likelihood of confusion. However, in some instances, a single additional *DuPont* factor is pivotal and outweighs these two key factors. Such is the case here. The thirteenth and final *DuPont* factor allows for the consideration of any additional probative facts to accommodate the need for flexibility in assessing each unique set of facts. *DuPont*, 177 USPQ at 567.

Applicant claims ownership of Registration No. 5611178 for the mark,



for “clothing, namely, shirts, t-shirts, shorts, sweatshirts, pullovers, pants, jackets, coats, belts, socks, headwear and footwear,” in International Class 25. This registration issued on November 20, 2018, prior to the filing date of the

application that matured into the cited registration. In other words, applicant owns a registration for a mark incorporating the same applied-for term, AXION, for in-part identical goods. Applicant argues that because the USPTO failed to cite Applicant's earlier AXION mark against the cited mark, "it is arbitrary for AXEON LABS to now be cited against AXION on the grounds of likelihood of confusion."⁴

Cases involving prior registrations under the thirteenth factor customarily consider whether substantially similar marks should be allowed to coexist on the Register because of an applicant's prior registration of a similar mark for the involved goods or services. *See, e.g., In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790 (TTAB 2017) (finding composite mark including the words USA WARRIORS ICE HOCKEY and NONE TOUGHER separated by a logo likely to cause confusion with composite mark including the words USA HOCKEY despite applicant's prior registration of composite mark including the words USA WARRIORS ICE HOCKEY and NONE TOUGHER separated by a logo); *In re Strategic Partners Inc.*, 102 USPQ2d 1397 (TTAB 2012) (finding that applicant's ownership of a prior registration for a substantially similar mark for the same goods which had coexisted with the cited

⁴ Applicant's Br, p. 1, 4 TTABVUE 7. We give no consideration to Applicant's arguments that Registrant's mark should not have been granted registration and that Registrant's mark is not being used on the goods. These arguments are an impermissible collateral attack on the validity of the cited registration, which we cannot entertain in the absence of a petition to cancel. *See In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (Applicant in an ex parte proceeding is not permitted to argue that a cited registration is unregistrable); *Dixie Rests.*, 41 USPQ2d at 1534-35 ("Dixie's argument that DELTA is not actually used in connection with restaurant services amounts to a thinly-veiled collateral attack on the validity of the registration.").

registration for over five years was sufficient to “tip the scale in favor of applicant and a finding of no likelihood of confusion.”).

When determining whether the coexistence of an applicant’s prior registration with another party’s registration weighs against citing the latter registration in a Section 2(d) refusal of the applicant’s mark, the examining attorney should consider: (1) whether the applicant’s prior registered mark is the same as applicant’s mark or is otherwise not meaningfully different; (2) whether the identifications of goods or services in the application and the applicant’s prior registration are identical or identical in relevant part; and (3) the length of time the applicant’s prior registration has coexisted with the registration being considered as the basis for the Section 2(d) refusal. *Strategic Partners*, 102 USPQ2d at 1400; TMEP § 1207.01. The duration of coexistence is not dispositive as to whether a Section 2(d) refusal should issue; instead, this factor should be considered together with all the other relevant *DuPont* factors. *See id.*; *cf. Inn at St. John’s*, 126 USPQ2d at 1748 (finding that applicant’s earlier registration of a partially similar mark was a neutral factor in the Section 2(d) analysis, because the mark in the application was more similar to the cited registered mark than applicant’s previously registered mark); *USA Warriors Ice Hockey Program*, 122 USPQ2d at 1793 (distinguishing *Strategic Partners* and finding that the three and-a-half year coexistence of applicant’s prior registration and the cited registration was a relevant consideration but did not cause the thirteenth factor to outweigh the other relevant *DuPont* factors).

The Examining Attorney argues that *Strategic Partners* is inapplicable because Applicant's prior registration has coexisted on the Principal Register with the cited registration for less than eighteen months. We emphasize, however, that a holistic review of the record and our case law require us to base our decision and rationale on more than just the length of time the cited mark, post-registration, has coexisted with Applicant's prior registration.

In *Strategic Partners*, the applicant's mark, ANYWEAR in stylized form, was substantially similar to the mark in its prior registration, ANYWEARS. In this case, Applicant's standard character mark, AXION, does not differ meaningfully from the



literal portion of the mark in Applicant's prior registration, **axion**, for partially identical articles of clothing, because consumers are generally more inclined to focus on and remember the word portion of a composite mark. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citation omitted); *see also Palm Bay*, 73 USPQ2d at 1692 (consumers are generally more inclined to focus on the first word of a mark).

We acknowledge that prior decisions and actions of other trademark examining attorneys are not binding on the USPTO or the Board. *See In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1206 (TTAB 2009); *USA Warriors Ice Hockey Program*, 122 USPQ2d at 1793 & n.10. Notwithstanding the USPTO's allowance of the cited registration over Applicant's prior registration, we do not hold that we are bound by a decision, made by the involved examining attorney that there was no likelihood of

confusion between the cited AXEON LABS mark and the mark in Applicant's prior registration. Instead, we conclude that under the particular circumstances of this case, where: (1) Applicant owns a prior registration for a substantially similar mark covering goods nearly identical to those in the involved application; and (2) the examining attorney who examined the cited registration did not refuse registration of that mark based on a likelihood of confusion with the mark in Applicant's prior registration, we give the fact that no likelihood of confusion was found due weight in our analysis as support for our ultimate conclusion, based on all of the *DuPont* factors, that, as in *Strategic Partners*, confusion is unlikely. Thus, although the first, second, and third *DuPont* factors weigh in favor of finding a likelihood of confusion, we find, as in *Strategic Partners*, that the thirteenth *DuPont* factor tips the scale and outweighs them all, making confusion unlikely under the specific facts of this case. *See Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 119 USPQ2d 1286, 1290 (Fed. Cir. 2016) (“[A] single *DuPont* factor may be dispositive in a likelihood of confusion analysis[.]”) (citation omitted); *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460 (Fed. Cir. 1998) (“[O]ne *DuPont* factor may be dispositive in a likelihood of confusion analysis[.]”).

D. Conclusion

After considering all of the evidence and arguments, we find that despite the similarity of the marks in sound, appearance, connotation, and commercial impression; the legal identity of the goods; and the consequent legally identical channels of trade, confusion is not likely. The fact that the USPTO permitted the cited registration to issue over Applicant's prior registration for a substantially

similar mark and in-part identical goods, buttresses our ultimate conclusion that there is no likelihood of confusion between Applicant's AXION mark and the AXION LABS mark.

Decision: The refusal to register Applicant's mark is reversed.